

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

87 = 2218

MANUEL DEJESUS PEGUERO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT

Supreme Court, U.S.
FILED
MAY 26 1998
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY ID # 38910

*Counsel for Petitioner,
Manuel Dejesus Peguero*

@
47PP

QUESTION PRESENTED

SHOULD CERTIORARI BE GRANTED TO RESOLVE A SPLIT
AMONG THE CIRCUITS REGARDING THE LEGAL
STANDARD TO BE APPLIED WHEN A PRISONER SEEKS
POST-CONVICTION RELIEF UNDER 28 U.S.C. §2255 ON
THE GROUND THAT THE SENTENCING JUDGE DID NOT
INFORM HIM OF HIS APPELLATE RIGHTS?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

87-9217

MANUEL DEJESUS PEGUERO,

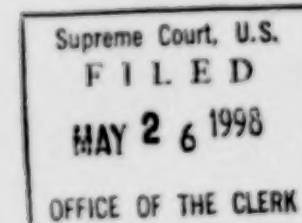
PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENTS

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS



Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, petitioner Manuel Dejesus Peguero asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed in forma pauperis pursuant to an appointment under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6). Pursuant to the Criminal Justice Act, the Federal Public Defender's Office was appointed to represent the petitioner in the United States

District Court for the Middle District of Pennsylvania and in the United States Court of Appeals for the Third Circuit. Leave to proceed in forma pauperis has not been sought in any other court.

DATED: May 22, 1998

Respectfully submitted,

Date: May 22, 1998



DANIEL I. SIEGEL, ESQUIRE
Asst. Federal Public Defender
100 Chestnut Street, Suite 306
Harrisburg, PA 17101
(717) 782-2237
Attorney ID # 38910

Counsel for Petitioner,
Manuel DeJesus Peguero

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MANUEL DEJESUS PEGUERO,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENTS

CERTIFICATE OF SERVICE
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

AND

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

I, Daniel I. Siegel, a member of the Bar of this Court, hereby certify that on this 22nd day of May, 1998, copies of the Motion for Leave to Proceed in Forma Pauperis and

the Petition for a Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following:

Seth Waxman, Esquire
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530
(202) 514-2201

Mr. P. Douglas Sisk, Clerk
United States Court of Appeals
for the Third Circuit
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Kim D. Daniel, Esquire
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Mr. Manuel DeJesus Peguero
Federal No. 06524-067
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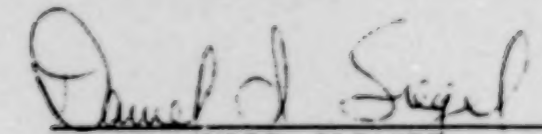
I further certify that I am a member of the Bar of this Court and that all parties required to be served have been served.

DATED: May 22, 1998

Date:

May 22, 1998

Respectfully submitted,



DANIEL I. SIEGEL, ESQUIRE
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Manuel DeJesus Peguero

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MANUEL DEJESUS PEGUERO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

AND NOW comes the petitioner, Manuel DeJesus Peguero, by his attorney Daniel I. Siegel of the Federal Public Defender's Office, and respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for Third Circuit is reprinted in the appendix at page 1a. The unreported opinion of the United States District Court for the Middle District of Pennsylvania, Caldwell, J., is reprinted in the appendix at page 7a.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its memorandum opinion and judgment order on February 27, 1998 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

On April 22, 1992, the date of Mr. Peguero's sentencing hearing, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided as follows:

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Effective December 1, 1994, the rule regarding notification of appellate rights was transferred to Rule 32(c)(5) of the Federal Rules of Criminal Procedure. As reflected in the Advisory Committee Notes to the 1994 Amendments, "[a]lthough the provision has been rewritten, the Committee intends no substantive change in practice." The current Criminal Rule 32(c)(5) reads as follows:

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

STATEMENT OF THE FACTS

1. Overview

When Manuel Peguero was sentenced in 1992 for his participation in a drug conspiracy, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that at the time of sentencing, "the court shall advise the defendant of any right to appeal the sentence." The rule regarding advice of appellate rights now appears at Rule 32(c)(5) of the Federal Rules of Criminal Procedure. The district court imposed a sentence of 274 months imprisonment, but did not inform Mr. Peguero of his right to file an appeal. Appointed counsel did not file a notice of appeal, and no direct appeal was pursued.

Four and a half years later, Mr. Peguero filed a motion for post-conviction relief under 28 U.S.C. §2255. Citing the district court's failure to warn him of his appellate rights, Mr. Peguero sought an opportunity to pursue a direct appeal. He requested that the judgment of sentence be vacated, and that the case be scheduled for a new sentencing hearing. Relief was denied in the district court (7a, 28a), and the district court's order was affirmed by the United States Court of Appeals for the Third Circuit (1a).

There is a split among the circuits regarding the standard to be applied when a prisoner asserts, in a post-conviction motion, that the sentencing court did not inform him of his appellate rights. Seven circuits hold that failure to warn of appellate rights constitutes error per se, requiring the reviewing court to vacate the sentence and remand for resentencing; two circuits require that the prisoner show some type of harm stemming

from the sentencing court's failure to notify him of his right to appeal. See Thompson v. United States, 111 F.3d 109 (11th Cir. 1997) (collecting cases). Petitioner seeks relief under the majority rule, and asserts that the petition for writ of certiorari should be granted so that this Court may resolve the split among the circuits.

2. The guilty plea and the sentence

On January 6, 1992, defendant Manuel DeJesus Peguero appeared before the United States District Court for the Middle District of Pennsylvania, Caldwell, J., at which time he pled guilty to participating in a drug conspiracy in violation of 21 U.S.C. §846. On April 22, 1992, Mr. Peguero appeared before Judge Caldwell for sentencing, at which time he received a sentence of 274 months imprisonment.

In April of 1992, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that at the time of sentencing, "the court shall advise the defendant of any right to appeal the sentence." The district court did not advise Mr. Peguero of his right to appeal the sentence, and defense counsel did not file a notice of appeal.

3. The post-conviction motion

On December 10, 1996, four and a half years after his sentencing hearing, Mr. Peguero filed a pro se motion for relief under 28 U.S.C. §2255. Mr. Peguero alleged, inter alia, that prior counsel had been ineffective in failing to file a direct appeal, despite defendant's explicit instructions to do so.

On April 23, 1997, the Federal Public Defender for the Middle District of Pennsylvania was appointed to represent Mr. Peguero. Counsel secured a transcript of the sentencing hearing, and discovered that the district court had not warned Mr. Peguero of his appellate rights as required under Criminal Rule 32(a)(2). On June 4, 1997, the defendant filed an amended petition citing the failure to notify the defendant of his appellate rights, and requesting that the defendant be resentenced so that he could thereafter file a timely notice of appeal.

4. The evidentiary hearing

An evidentiary hearing on defendant's motion for post-conviction relief was conducted on June 10, 1997. At that hearing, the district court heard testimony from defendant's trial counsel, Rex Bickley, Esquire, and from the defendant, Manuel Peguero.

Mr. Bickley testified that on the day of the sentencing hearing, after the conclusion of the sentencing hearing, he notified Mr. Peguero of his right to file an appeal. According to Mr. Bickley, the defendant indicated that he did not want to take an appeal, but instead wanted to secure a downward departure by cooperating with the government.

Mr. Peguero disputed the testimony offered by his prior attorney. The defendant testified that at "the moment of the sentence" he told his attorney to file an appeal.

5. The district court's memorandum and order

On July 1, 1997, the district court filed an unreported memorandum and order denying the motion for relief under 28 U.S.C. §2255 (7a). The district court credited Attorney Bickley's testimony, and found that the defendant had knowingly waived his appellate rights (20a - 22a). The district court concluded that because the defendant was not actually unaware of his appellate rights, the violation of Criminal Rule 32(a)(2) was not cognizable in a motion for relief under 28 U.S.C. §2255 (25a).

Pursuant to 28 U.S.C. §2253, a certificate of appealability was granted as to the single issue presented herein. Notice of appeal was filed July 30, 1997.

6. Affirmance in the Court of Appeals

On February 27, 1998, the United States Court of Appeals for the Third Circuit issued an unreported memorandum opinion and judgment order affirming the order of the district court (1a).

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States, review on a writ of certiorari may be appropriate where there is a conflict among the courts of appeals on a matter of importance. In this case, there is a conflict among the federal circuits regarding the standard to be applied when a prisoner seeks post-conviction relief under 28 U.S.C. §2255 on the ground that the sentencing court did not inform him of his appellate rights as required by the former Rule 32(a)(2), the current Rule 32(c)(5), of the Federal Rules of Criminal Procedure.

The conflicting decisions in this area were recently discussed by the Eleventh Circuit in Thompson v. United States, 111 F.3d 109 (11th Cir. 1997) (granting post-conviction relief under 28 U.S.C. §2255). As stated by the Eleventh Circuit:

The circuit courts are divided on the question of what standard is used to review a sentencing court's failure to advise a defendant of his right to appeal. Six circuits have held that such a failure constitutes error per se, requiring the reviewing court to vacate the sentence and remand for resentencing. United States v. Sanchez, 88 F.3d 1243, 1249 (D.C.Cir.1996); Reid v. United States, 69 F.3d 688, 690 (2d Cir.1995); United States v. Butler, 938 F.2d 702, 703-04 (6th Cir.1991); Paige v. United States, 443 F.2d 781, 782 (4th Cir.1971); United States v. Deans, 436 F.2d 596, 598-99 (3d Cir.1971); United States v. Benthien, 434 F.2d 1031, 1032-33 (1st Cir.1970). Two other circuits have held that a petitioner must show some type of harm stemming from the sentencing court's failure to notify him of his right to appeal. Tress v. United States, 87 F.3d 188, 189 (7th Cir.1996); United States v. Drummond, 903 F.2d 1171, 1174 (8th Cir.1990), cert. denied, 498 U.S. 1049, 111 S.Ct. 759, 112 L.Ed.2d 779 (1991); see also Biro v. United States, 24 F.3d 1140, 1142 (9th Cir.1994).

Id. at 110-11. In Thompson, the Eleventh Circuit adopted the majority rule, reasoning that "the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2)." Id. at 111 (cite omitted).

Petitioner is aware that as a general rule, violations of the Rules of Criminal Procedure are not cognizable in post-conviction proceedings absent prejudice to the defendant. United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085 (1979). There is an exception to that general rule, however, where failure to apply the rule of criminal procedure constitutes "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962), United States v. Timmreck, supra, 441 U.S. at 784, 99 S.Ct. at 2087. If certiorari is granted, petitioner will argue that a district court's failure to inform the defendant of his appellate rights constitutes an omission inconsistent with the rudimentary demands of fair procedure, thus justifying post-conviction relief as a matter of law. Petitioner will request that the judgment of sentence be vacated, and that the case be remanded for resentencing, after which Mr. Peguero will have the opportunity to file a timely notice of appeal.

CONCLUSION

WHEREFORE, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

Date: May 22, 1998



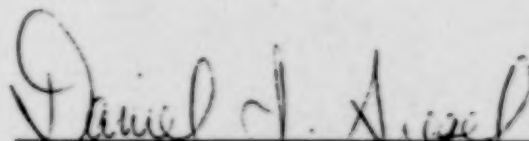
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Attorney ID # 38910

*Counsel for Petitioner,
Manuel DeJesus Peguero*

CERTIFICATE OF BAR MEMBERSHIP

I, DANIEL I. SIEGEL, of the Federal Public Defender's Office, hereby certify that I am a member of the Bar of this Court.

Respectfully submitted,



DANIEL I. SIEGEL, ESQUIRE
Assistant Federal Public Defender

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7384

UNITED STATES OF AMERICA,
Appellee

v.

MANUEL DEJESUS PEGUERO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

D.C. Crim. No. 90-cr-00097-1

District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 1998

Before: Greenberg, Nygaard and McKee, Circuit Judges

(Filed February 17, 1998) ✓

MEMORANDUM OPINION

McKee, Circuit Judge.

In this appeal, we are asked to review the district court's denial of Manuel DeJesus Peguero's petition for post-conviction relief, pursuant to 28 U.S.C. § 2255.

Peguero alleges that the district court erred as a matter of law in denying his petition for relief since the court had previously failed to advise Peguero of his appellate rights as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. For the reasons explained below, Peguero's argument is meritless and we will affirm the order of the district court.

I.

In 1992, Peguero pled guilty in the United States District Court for the Middle District of Pennsylvania to conspiracy to distribute and possessing with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. § 846. The court sentenced Peguero to 274 months imprisonment. The court did not advise Peguero of his appellate rights and Peguero did not file a notice of appeal.

In 1996, Peguero filed a pro se petition for post-conviction relief under 28 U.S.C. § 2255. After a public defender was appointed, Peguero filed an amended petition for relief. This petition requested that Peguero's sentence be vacated and the case listed for resentencing since the court had failed to notify Peguero of his right to appeal his conviction. Such acts would result in the reinstatement of Peguero's appellate rights.

In 1997, an evidentiary hearing was held where Peguero's former counsel, Rex Bickley, testified that on the day of the sentencing hearing he informed Peguero of his right to appeal. D.Ct.Op. at 10. Peguero, however, indicated that he did not wish to appeal. Rather, he wanted to cooperate with the government with the hope of securing a downward departure on his sentence for substantial assistance. Peguero himself testified

that, "[at] the moment of the sentence," he told Bickley to file an appeal. App. at 128.

The court filed a memorandum and order denying the petition for relief, finding that Peguero was sufficiently aware of his right to appeal and had knowingly waived that right. Relying on United States v. Timmreck, 441 U.S. 780 (1979), the court found that Peguero was not "actually unaware" of his right to appeal. Consequently, the court deemed its violation of Rule 32(a)(2) insufficient "to vacate a sentence under § 2255." D.Ct. Op. at 19.

Peguero now appeals.

II.

We have jurisdiction of final orders pursuant to 28 U.S.C. § 1291. When we review a district court's decision granting or denying a petition for post-conviction relief our standard is de novo. United States v. Cleary, 46 F.3d 307, 310 (3d Cir. 1995).

III.

Peguero argues that the district court's failure to advise him of his appellate rights is a per se violation, necessitating post-conviction relief. The government responds that the court's failure to notify was a "technical violation" and must be subject to a harmless error analysis.

"[A] sentencing court's failure to inform a defendant of the right to appeal following a jury conviction is 'harmless error' if the government can show by clear and convincing evidence that the defendant knew of the right to appeal. (citation omitted). We see no reason for not applying the same analysis in the guilty plea context, where

appeal rights are more limited." McCumber v. United States, 30 F.3d 78, 79 (8th Cir. 1994).

The court based its decision to deny Peguero's petition for post-conviction relief on several factors: 1) Peguero was aware of his appellate rights given his guilty plea and desire to cooperate with the government in exchange for a downward departure on his sentence; 2) Peguero waited over four years to file his claim for post-conviction relief; and 3) The court knew and respected Peguero's counsel, who testified that Peguero was aware of his right to appeal. See D.Ct.Op. at 15-16.

Without even crediting Peguero's former counsel's testimony, it is clear that Peguero knew of his right to appeal. The purpose behind Rule 32(a)(2) is to insure that a defendant is aware of this right. Consequently, the district court's error did not result in a miscarriage of justice.

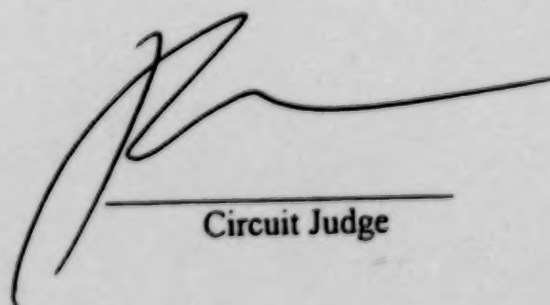
IV.

The foregoing demonstrates that the court's failure was harmless and thus does not justify collateral attack by Peguero.

Affirmed.

TO THE CLERK:

Please file the foregoing opinion.



Circuit Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7384

UNITED STATES OF AMERICA,
Appellee

v.

MANUEL DEJESUS PEGUERO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

D.C. Crim. No. 90-cr-00097-1
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 1998

Before: Greenberg, Nygaard and McKee, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on February 12, 1998.

On consideration whereof, it is hereby ordered and adjudged by this court that the

order denying post-conviction relief entered on July 1, 1997 be and the same is affirmed.

ATTEST:

Patricia A. Cole
Acting Clerk

FEB 27 1998

Alan
RECEIVED

JUL 1 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
FEDERAL PUBLIC DEFENDER
HARRISBURG, PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff

vs.

MANUEL D. PEGUERO,
Defendant

:
:
: CRIMINAL ACTION NO. 1:CR-90-97-01
: CIVIL ACTION NO. 1:CV-96-2143
:

FILED
HARRISBURG, PA

JUL - 1 1997

MARY E. DIANDREA, CLERK
Per *[Signature]*
Deputy Clerk

MEMORANDUM

I. Introduction.

The defendant, Manuel Peguero, filed a pro se motion under 28 U.S.C. § 2255, seeking to vacate the 274-month sentence imposed on him after his plea of guilty to count I of the indictment charging him under 21 U.S.C. § 846 with conspiring to distribute and possessing with intent to distribute, more than five kilograms of cocaine. After review of the motion, we appointed the Federal Public Defender to represent him. The public defender filed an "amended" 2255 motion and an "evidentiary hearing memorandum" which raise additional grounds for relief.

The pro se motion makes the following arguments, all based on trial counsel's ineffectiveness: (1) counsel told the defendant that he would receive a maximum of ten years in prison if he pled guilty, less than half of the almost 22-and-one-half-year sentence he did receive; (2) counsel failed to explain the nature of the plea agreement; (3) counsel improperly stipulated

that defendant was a manager or supervisor of the conspiracy, leading to an enhanced sentence; (4) counsel did not take a direct appeal although defendant instructed him to do so; and (5) counsel failed to insure that defendant's sentence was comparable to his coconspirators.

The amended motion adds the following ground: the court did not advise the defendant pursuant to Fed. R. Crim. P. 32(a)(2) at his guilty-plea or sentencing hearings of his right to appeal. The "evidentiary hearing memorandum" adds two grounds. First, the plea should be vacated because the court violated Fed. R. Crim. P. 11(c) by not advising the defendant at the time of his plea of: (1) the mandatory minimum penalty; (2) the maximum possible penalty; (3) the effect of any supervised release term; (4) the right to assistance of counsel at trial; (5) the right to confront and cross-examine witnesses at trial; (6) the right against compelled self-incrimination at trial; and (7) that any statements made under oath could be used against the defendant in a later prosecution for perjury or false statements. Second, the sentence should be vacated because the court did not ask the defendant if his plea was the result of any threats or promises outside the plea agreement. The defendant maintains that the latter failure was especially prejudicial because it would have revealed the defendant's erroneous understanding that he was only going to receive a 10-year term.

On June 10, 1997, we held a hearing on the motion. Based on that hearing and the transcripts of prior proceedings, we provide the following background.

II. Background.

On April 3, 1990, the defendant was charged in an indictment with the following offenses: (1) in count I, conspiracy to distribute and possess with intent to distribute cocaine from March 1989 through January 19, 1990, in violation of 21 U.S.C. §§ 841(a)(1) and 846; (2) in count II, distribution and possession with intent to distribute cocaine on September 27, 1989, in violation of 21 U.S.C. § 841(a)(1); (3) in count III, distribution and possession with intent to distribute six ounces of cocaine on January 13, 1990, within 1,000 feet of a school in violation of 21 U.S.C. § 845a(1); and (4) in count IV, conspiracy with a minor for the purpose of distributing cocaine from December 20, 1989, through January 13, 1990, in violation of 21 U.S.C. § 845b.

In January 1992, the defendant executed a plea agreement, dated January 2, 1992. In paragraph one he agreed to plead guilty to count I of the indictment. Paragraph one also advised the defendant that the "maximum penalty for the offense is imprisonment for a period no less than 10 years and a maximum of life imprisonment and/or a fine of \$4,000,000, a term of supervised release to be determined by the court, the costs of

prosecution as well as an assessment in the amount of \$50." (Plea agreement, ¶ 1). Finally, this paragraph stipulated that "the defendant's personal involvement in this conspiracy . . . was no less than 15 kilos and no more than 50 kilos of cocaine."

The agreement also informed the defendant that the court was not a party to the agreement and was not bound by any recommendation that he or the government might make concerning the sentence to be imposed. (*Id.*, ¶ 14). "Thus, the Court [was] free to impose upon the defendant any sentence up to and including the maximum sentence of imprisonment for life" (*Id.*) (brackets added). The government was allowed to recommend a sentence that it "consider[ed] appropriate based upon the nature and circumstances of the case and the defendant's participation in the offense. . . ." (*Id.*, ¶ 9) (brackets added). The government specifically reserve[d] the right to recommend a sentence up to and including the maximum sentence" (*Id.*) (brackets added). Finally, the agreement provided that the defendant could not withdraw his guilty plea if he was dissatisfied with the court's sentence or if it declined to follow any of the parties' recommendations as to sentencing, (*id.* at ¶ 15), and it contained a merger clause, specifying that there were no other written or oral agreements and that "[n]o other promises or inducements" had been made to the defendant. (*Id.*, ¶ 29) (brackets added).

The defendant signed the agreement under a paragraph stating: "I have read this agreement and carefully reviewed every

part of it with my attorney. I fully understand it and I voluntarily agree to it." His attorney also signed it under a paragraph stating: "I am the defendant's counsel. I have carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter into this agreement is an informed and voluntary one."

The defendant is an Hispanic born in the Dominican Republic. He has some knowledge of English, but a Spanish interpreter was present at all court proceedings.

On January 6, 1992, a guilty-plea hearing was held. The prosecutor opened the hearing by noting the essentials of the agreement--that the defendant would plead guilty to count I and that his quantity of cocaine would be set at not less than 15 nor more than 50 kilograms of cocaine. (doc. 60 at p. 6). Defense counsel then noted the provision that the government would move for a downward departure if the defendant provided assistance. (*Id.*).

Later in the hearing, the court questioned the defendant about the knowing and voluntary nature of the plea. The defendant indicated that he had consulted with his attorney about the change of plea, that counsel had fully informed him of his rights "as far as [the defendant] kn[ew]," that he understood that he did not have to plead guilty, that he could be tried by a jury, that by pleading guilty he gave up the presumption of innocence and relieved the government of the necessity to present evidence, and

that his guilt was established by his admission of guilt to the court. (Id. at pps. 7-8) (brackets added).

The court then turned to the sentencing issue. The defendant stated that defense counsel had explained the sentencing guidelines to him, and that he understood the sentence was controlled to some extent by the quantity of cocaine attributed to him, and that the government had calculated his potential sentence was in the "range of 20 years and upwards." (Id. at pps. 9-10). The defendant also said that he was satisfied with counsel's representation, (id. at p. 8), and that he "just want[ed] to plead guilty and get on with the sentencing." (Id. at p. 12) (brackets added).

On April 22, 1992, a sentencing hearing was held. Defendant objected to the four-level enhancement the government sought under U.S.S.G. § 3B1.1(a) for being an organizer or leader of the conspiracy. The defendant testified, seeking to minimize his role in the offense. The prosecutor cross-examined him and proffered transcripts of the testimony of his coconspirators in related criminal proceedings concerning his position in the conspiracy. Eventually, the government and defense counsel stipulated that the defendant would be subject to a three-level enhancement under § 3B1.1(b) as a manager or supervisor. (Doc. 50, sentencing transcript at p. 19).

Defense counsel then argued on his client's behalf as to an appropriate sentence. He acknowledged the defendant's involvement in the sale of narcotics, but then said:

Almost from the very outset, however, Your Honor, Mr. Peguero came to me and indicated a willingness to cooperate and a willingness to enter a plea of guilty. Now at that time he was somewhat uncertain as to the nature of his sentence, but, in any event, he did indicate he wanted to plead guilty, he wanted to cooperate and get this behind him

(Id. at pps. 20-21).

At the time of sentencing, the defendant had four prior convictions in New Jersey, all for drug offenses.

The defendant was subject to U.S.S.G. § 5G1.3, allowing the court to impose concurrent or consecutive sentences or partially concurrent or consecutive sentences, for having committed his federal offense while he was on bail from his two 1988 New Jersey drug offenses. He was also subject to an enhancement under § 2J1.7 of the guidelines for commission of an offense while on release. Additionally, he was classified in criminal history category VI as a career offender because he had at least two prior convictions for drug offenses as an adult. The defendant's guideline range was 292 months to 365 months. The court took sections 5G1.3 and 2J1.7 into account by going below the minimum guideline to 274 months imprisonment, not as much of a reduction if only § 5G1.3 had been considered alone, but determined to be appropriate when the enhancement under § 2J1.7

was considered. He was also given five years of supervised release. This sentence was ordered to be served consecutively to the New Jersey sentence of 10 years of which the defendant was required to serve four years.

The defendant took no direct appeal of his conviction or sentence. He later sought some judicial relief. In January 1995, he filed a motion for free transcripts, alleging that he needed the transcripts because his memory of the guilty-plea and sentencing hearings was not good and he wanted to raise three specific grounds for relief from his conviction: (1) the career offender guideline should not have been used to set his sentence; (2) he should have received credit on his sentence from the date of his indictment rather than the date of sentencing; and (3) trial counsel was ineffective for not raising the first two grounds. By order, dated February 24, 1995, we denied the motion, in part, because he had no 2255 motion pending at the time and because the grounds he wished to raise would not have appeared in the record in any event.

On March 16, 1995, the defendant filed a "motion for clarification of sentence," an apparent attempt to lay the groundwork for an attack on his sentence by finding out the factors that had been considered at sentencing.

There were also some extrajudicial attempts at relief. In August 1993, his mother wrote the court asking for a reduction in his sentence. In that letter, his mother also said: "My son's

Lawyer told told (sic) him that if he declared himself guilty he would get a sentence of seven years, but it was not truth because he received a sentence of 23 years." At the bottom of this letter, the defendant's wife also asked for assistance but did not mention the purported sentencing deal. (On August 18, 1993, the Probation Office responded to that letter by noting that the court was unable to change the sentence imposed.) In July 1995, his mother wrote again asking that he be deported because she had cancer and she wanted to be with him in the time she had left.

The current 2255 proceeding, initiated on December 10, 1996, coming some four-and-one-half years after his sentence, is the defendant's first attempt at postconviction relief, and the first time he ever personally brought to the court's attention his claim that his lawyer had promised him a 10-year sentence.

At the hearing held to resolve the factual issues raised, his trial counsel testified. Counsel had received discovery material from the government in December 1991 concerning the merits of the case against Peguero, consisting of 39 pieces of evidence including witness statements and evidence from the trial of a coconspirator, Miguel "Pepe" Feliciano-Rosario. (Doc. 78 at pps. 19-21). Counsel advised the defendant that a significant case could be brought against him. (*Id.* at 21-22). Counsel also stated that he always had an interpreter with him when he met with Peguero, at least after their initial meeting. (*Id.* at 25).

As to review of the plea agreement, counsel said that he went over it in detail with the defendant, including such provisions as the defendant's cocaine quantity as well as his maximum sentence. (Id. at 23-25). He believes he told the defendant, based on notes in his file, that he was looking at 210 to 324 months in prison. (Id. at 26). He also believes that he told the defendant about the career-offender provision but does not recall specifically doing so. (Id. at 11).

Counsel also testified about a portion of a letter he had written to the prosecutor, attached as an exhibit to the government's response to the 2255 motion. Counsel wrote that the defendant "may not have fully comprehended the situation." Counsel said that he meant by this statement that defendants often do not understand the length of federal sentences as opposed to state sentences. (Id. at 14).

As to taking an appeal, counsel testified that he told Peguero he had a right to an appeal and that he would represent him. (Id. at 12-13, 31). However, the defendant did not want to take an appeal, preferring instead to cooperate with the government in an attempt to reduce his sentence. (Id. at 13, 31). The defendant never wrote him after that asking for an appeal; he just wrote letters with information that might be helpful to the government. (Id. at 32-33). The first time counsel heard about the defendant's contention that he had wanted an appeal was

earlier in 1997 when the prosecutor contacted him after the 2255 motion had been filed. (Id. at 33).

As to counsel's alleged statement that the defendant would receive only 10 years, counsel denied making it. (Id. at 26). Instead, he told the defendant he would receive a "significant sentence" and that he was unsure of the exact length. (Id.).

Peguero also testified. As to review of the plea agreement, Peguero acknowledged meeting with counsel personally and that an interpreter was present but that they only met about the agreement for about five to 10 minutes. (Id. at 43). He testified that the agreement was never read to him, explained to him, or summarized for him. (Id. at 43). Peguero acknowledged that the signature on the agreement was his, but denied filling in the date. (Id. at 49-50). He signed it because counsel advised him he would only get 10 years. (Id. at 54).

Peguero met with his attorney before the guilty-plea hearing and had a fast conversation. Counsel told him through the interpreter that he would get 10 years. (Id. at 45). In fact, "from the first time they met," counsel had told him he would get 10 years. (Id. at 41). Later, when he received 274 months at the sentencing, he felt a "shock in [his] heart." (Id. at 46) (brackets added). He was "left dumb." (Id. at 61). His attorney left after the sentencing hearing, and he did not see him. (Id. at 46).

The defendant understood most of the guilty-plea hearing. (*Id.* at 56). He was not sick at the time or on medication. (*Id.*). At the 2255 hearing, the prosecutor confronted him with his affirmative responses to the court's questions at the guilty-plea hearing about consulting with his attorney about the change of plea, being fully informed by his counsel of his rights, and being satisfied with counsel's representation. Peguero responded that he answered the first and third questions that way because his lawyer had told him he would get 10 years. (*Id.* at 57). As to his reaction to the government's calculation of his sentence as greater than 20 years, he said that he did not pay attention, that he believed in his attorney. (*Id.* at 59). He also said that he was confused and disoriented at the time, (*id.* at 56), and that "sometimes you hear some things and you cannot comprehend them." (*Id.* at 59). The defendant would have mentioned the promise of a 10-year sentence at the guilty-plea hearing, and he would not have pled guilty, if he had known the promise would not be enforced. (*Id.* at 48).

As to an appeal, at the moment of sentencing, Peguero said in English that he wanted to appeal. (*Id.* at 46). Shortly after the sentencing, while he was at Union County Prison, a fellow prisoner wrote a letter to his attorney, dated April 29, 1992: (1) expressing the defendant's confusion about the sentence he received and mentioning the 10-year sentence he was supposed to have gotten; (2) requesting that an appeal be taken; and (3)

offering to consider cooperating. Contrary to his statement at the 2255 hearing, the defendant also questioned why his counsel would not meet with him before the sentencing hearing. (*Id.* at 47; government's exhibit 1 at the 2255 hearing).

As an explanation as to why he had waited so long to seek judicial relief from his sentence, the defendant stated that "he thinks" he, his wife and his mother had all written letters to the court about the 10-year sentence he was supposed to have received. (Doc. 78 at p. 63). His mother's letter was four years ago. Additionally, his wife would call his trial counsel and complain. (*Id.* at 63). He also hinted as a possible explanation for the delay that he had no money for transcripts and the court had denied his motion for free transcripts. (*Id.* at 61).

III. Discussion.

A. The Stipulation Concerning the Defendant's Role as a Manager or Supervisor of the Conspiracy and the Disparity Between the Defendant's Sentence and his Coconspirators.

We will deal first with the claims that trial counsel improperly stipulated that defendant was a manager or supervisor of the conspiracy, which led to a three-level enhancement, and that counsel failed to insure that defendant's sentence was comparable to his coconspirators.

We agree with the government that the first of these claims must fail because the defendant has provided no factual

support for the claim that he was not an organizer or supervisor. We also note that the presentence report's description of the offense conduct supports the enhancement.

The second of these claims also fails because the plaintiff similarly provides no support for his claim that he is entitled to the same sentence as certain of his conspirators. A mere disparity in the sentences received by codefendants under the guidelines is not a reason for a downward departure. United States v. Higgins, 967 F.2d 841 (3d Cir. 1992) (citing United States v. Joyner, 924 F.2d 454 (2d Cir. 1991)). The government also points out that their roles in the offense were not as great as the defendant's.

B. The Failure to Take an Appeal.

A direct appeal in a federal criminal case is a matter of right. United States v. Peak, 992 F.2d 39, 41 (4th Cir. 1993). Thus, the sixth amendment right to counsel applies to such an appeal, see id., and defense counsel must appeal when requested even if there are no meritorious issues. Id. See also United States ex rel. O'Brien v. Maroney, 423 F.2d 865, 868 (3d Cir. 1970) (dicta).

The key here, however, is whether the defendant requested an appeal. Defense counsel need not appeal if his client tells him not to so. Trial counsel testified that he did not appeal because his client did not want an appeal. Counsel

stated that defendant preferred instead to concentrate on providing cooperation so that his sentence would be reduced.

Although defendant testified that he requested an appeal immediately after being sentenced and produced a copy of a letter he said he mailed to counsel a few days after sentencing, we accept counsel's version of events. First, it is the most consistent with prior proceedings. The reason counsel stated for not taking an appeal, cooperation in the hope of obtaining a reduced sentence, appears as early as the guilty-plea hearing when the first point counsel made at that hearing was the government's agreement to move for a reduced sentence in return for cooperation. Similarly, at the sentencing hearing, counsel tried to minimize the sentence the defendant would receive by pointing out that "[a]lmost from the very outset," the defendant indicated a willingness to cooperate, as well as plead guilty.

Second, we can take into account how long it has taken the defendant to finally present this claim to the court, having raised it for the first time in his 2255 motion some four and one-half years after sentencing. Even though the defendant argues that he told his lawyer at sentencing to take an appeal, the failure of counsel to do so was never mentioned in either of the motions the defendant filed after he was sentenced or in any letters to the court. The need for a transcript cannot excuse the late filing since the lack of a transcript did not prevent the

defendant from setting forth specific grounds for relief in his January 1995 motion for free transcripts.

Third, we note our experience with his trial counsel in previous matters. Counsel is an able lawyer, honest in his dealings with the court in the past, and there is no reason why he would not have taken an appeal if directed by defendant, or why he would deny having been asked to do so. Unfortunately for defendant, we can think of a very good reason why he would now want to be untruthful about his past desire for an appeal and fabricate evidence in support of his current claims.

We therefore reject the claim that counsel failed to take a requested appeal.

C. Counsel's Promise of a 10-Year Sentence and the Explanation of the Plea Agreement.

"A guilty plea induced by promises that divest the plea of its voluntary character is void." Zilich v. Reid, 36 F.3d 317, 321 (3d Cir. 1994) (citing Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473, 478 (1962)). An unfulfilled promise of a particular term of imprisonment is such a promise. See Zilich, 36 F.3d at 321 (an unkept promise of probation in return for a guilty plea negates the voluntariness of the plea).

In the instant case, the defendant maintains that his lawyer told him he would receive only a 10-year sentence. Counsel has testified that no such promise was made. For the second and

third reasons advanced above in regard to the appeal issue, we resolve this factual dispute against the defendant.

The first time the defendant ever moved in court for relief from his sentence on the ground that he was supposed to receive a 10-year sentence was in his 2255 motion, filed some four and one-half years after his sentencing, even though at sentencing the time he received caused him to be "struck dumb" and to feel a "shock to [his] heart," and even though he raised other grounds for relief in his motion for free transcripts. It is true that his mother wrote a letter to the court in August 1993, but she had no personal knowledge of any conversations her son had with his counsel (and aside from that she said he had been promised seven years, not 10 years).

Additionally, we can conceive of no reason why his trial counsel would not affirm the existence of this purported promise. To begin with, it is odd that "from the first time they met" counsel would have told him he would only get 10 years. How counsel could make this prediction so early on, or why he would do so, is difficult to understand. Counsel is an experienced courtroom litigator, he has in fact tried cases before the court in the past, so it seems that he would have simply tried the case if he had to. Perhaps one reason he did not was the strength of the government's case conveyed to him by the prosecutor.

We turn now to the claim that counsel did not explain the plea agreement to the defendant. For the reasons set forth

above, we resolve this factual dispute against the defendant as well. We find that the plea agreement in all material respects was explained to the defendant, that the defendant understood it, and that he signed it knowing what it contained.

The plea agreement provides an additional reason for rejecting the claim that trial counsel told him he would only receive 10 years. The agreement contains no such provision and, to the contrary, advises the defendant he could receive life in prison, that the government could recommend a sentence up to life, and that the court could impose the sentence it believed was appropriate.

D. The Court's Rule 11 and Rule 32 Violations.

The defendant argues that the sentence should be vacated because of the following rule violations. First, we did not advise him pursuant to Fed. R. Crim. P. 32(a)(2) at his guilty-plea or sentencing hearings of his right to appeal. Second, we did not advise him under Fed. R. Crim. P. 11(c) at the time of his plea of: (1) the mandatory minimum penalty; (2) the maximum possible penalty; (3) the effect of any supervised release term; (4) the right to assistance of counsel at trial; (5) the right to confront and cross-examine witnesses at trial; (6) the right against compelled self-incrimination at trial; and (7) that any statements made under oath could be used against the defendant in a later prosecution for perjury or false statements. Third, we

did not ask him under Rule 11(d) if his plea was the result of any threats or promises outside the plea agreement.

A mere violation of Rule 11 or Rule 32 is not enough to vacate a sentence under section 2255. See United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (Rule 11); United States v. Vancol, 778 F. Supp. 219 (D. Del. 1991) (Rule 32). Instead, in 2255 proceedings the defendant must show that the violation "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" Timmreck, 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638; Vancol, 778 F. Supp. at 223. A defendant could make this showing by establishing that he "was actually unaware" of the information the Rule intended to convey" or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." Timmreck, 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638.

In the instant case, we have already determined that the defendant knew about his right to appeal and decided not to exercise it. Thus, he cannot attack the Rule 32 violation in these proceedings.

We have also determined that he knew and understood the provisions of his plea agreement. The agreement advised him of his mandatory minimum penalty, the maximum possible penalty and that a term of supervised release would be imposed. He therefore cannot base his 2255 attack on the failure to give him this

information. As to the effect of any supervised release term, the defendant cannot now complain about it when the combined term of incarceration and supervised release is less than the sentence of life imprisonment of which he was advised in the plea agreement. See United States v. DeLuca, 889 F.2d 503 (3d Cir. 1989).

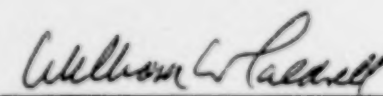
In regard to the other violations of Rule 11(c), we note first that we did advise the defendant, and he indicated that he understood, that he did not have to plead guilty, that he could be tried by a jury, that by pleading guilty he gave up the presumption of innocence and relieved the government of the necessity to present evidence. Even after being advised of these significant rights, the defendant nonetheless pled guilty, so we do not believe that if he had been advised of his other rights, he would not have done so. (In any event, the defendant undoubtedly knew that he had the right to be represented at trial by a lawyer by the fact that trial counsel had been appointed for him.) Moreover, and more importantly, the defendant never asserted at the hearing that he did not know of these rights (the defendant had four prior convictions, so he had previous experience with the criminal-justice system), or if he had been advised of them, he would not have pled guilty.

Finally, in regard to the Rule 11(d) violation, since the defendant had not been made any promise that did not appear in the plea agreement, the failure to ask him about any such promise was harmless.

E. Motion For Downward Departure Based on Postconviction Rehabilitation.

The defendant filed a memorandum in support of a request for a downward departure, based on the recent Third Circuit decision in United States v. Sally, No. 96-1864, 1997 WL 277972 (3d Cir. May 28, 1997). Sally allowed such a downward departure for postconviction rehabilitation efforts when the defendant had to be resentenced after he successfully vacated one of his convictions. Here, the defendant was not successful at vacating his sentence, and it does not appear that we otherwise have the authority to vacate his sentence to take into account postconviction rehabilitation efforts. We will therefore deny the request for a downward departure. However, the defendant may refile it if he can show that we have authority to consider it in the absence of his sentence being vacated.

We will issue an appropriate order.


William W. Caldwell
United States District Judge

Date: July 1, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff

vs.

MANUEL D. PEGUERO,
Defendant

;

:

: CRIMINAL ACTION NO. 1:CR-90-97-01
: CIVIL ACTION NO. 1:CV-96-2143

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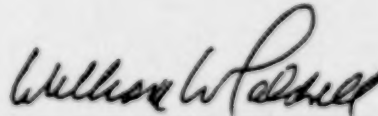
ORDER

AND NOW, this 1st day of July, 1997, it is ordered that:

1. The defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, filed December 10, 1996, and his amended 2255 motion, filed June 4, 1997, are denied.

2. The defendant's request for a downward departure is denied without prejudice

3. The Clerk of Court shall close this file.



William W. Caldwell
United States District Judge